



7555-01-P

## **NATIONAL SCIENCE FOUNDATION**

### **Identification of Federal Financial Assistance Infrastructure Programs Subject to the Build America, Buy America Provisions of the Infrastructure Investment and Jobs Act**

**AGENCY:** National Science Foundation.

**ACTION:** Notice.

**SUMMARY:** The Division of Acquisition and Cooperative Support within the National Science Foundation (NSF) is publishing this notice to advise the public of the report that reflects the National Science Foundation's analysis of financial assistance-funded infrastructure programs and associated Build America, Buy America requirements. NSF has focused on infrastructure related to science and education programs.

**FOR FURTHER INFORMATION CONTACT:** Patrick Breen, Division Director, Division of Acquisition and Cooperative Support, National Science Foundation. Phone: 703-292-7719; email: [pkbreen@nsf.gov](mailto:pkbreen@nsf.gov).

**SUPPLEMENTARY INFORMATION:** After OMB releases implementation guidance subject to section 70915 of the Infrastructure Investment and Jobs Act, the National Science Foundation will work closely with OMB to ensure that appropriate agency programs that are subject to Build America, Buy America requirements are administered with those requirements in place and will adhere to forthcoming OMB guidance. This analysis is subject to change upon further evaluation.

In accordance with Section 70913 of the Infrastructure Investment and Jobs Act (IIJA), which includes the "Build America, Buy America Act" (the Act), the National Science Foundation (NSF) is submitting the following information to the Office of Management

and Budget (OMB) and Congress. Additionally, NSF will publish this report in the Federal Register.

## **Background**

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act, which includes the “Build America, Buy America Act”. This Act requires agencies submit to the OMB and Congress a report within 60 days of its enactment, January 14, 2022, listing all Federal financial assistance programs for infrastructure administered by the agency. As required by the Act, this report will also be published in the Federal Register.

In accordance with the Act, NSF’s 60-day report includes the following information:

1. Identification of all domestic content procurement preferences applicable to Federal financial assistance;
2. An assessment of the application of the domestic content procurement preference requirements;
3. Details on any applicable domestic content procurement preference requirement, including the purpose, scope, applicability, and any exceptions and waivers issued under the requirement;
4. A description of the type of infrastructure projects that receive funding under the program; and
5. Identification and evaluation of all infrastructure programs to determine if they are inconsistent with section 70914 of the Act.

### **1. Domestic content procurement preference applicable to Federal financial assistance issued by NSF**

#### Grants

NSF has implemented one article in its Grant General Conditions (GC-1).

Article 44, Domestic Preference for Procurements, notifies awardees of the applicability of 2 CFR 200.322, entitled Domestic Preferences for Procurements. The Article, and the reference to 2 CFR 200.322, ensure that recipients provide preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States. These items include, but are not limited to, iron, aluminum, steel, cement, and other manufactured products.

#### Cooperative Agreements:

NSF has implemented two articles in its Cooperative Agreement Financial and Administrative Terms and Conditions (CA-FATC).

Article 45, Domestic Preference for Procurements, notifies awardees of the applicability of 2 CFR 200.322, entitled Domestic Preferences for Procurements. The Article, and the reference to 2 CFR 200.322, ensure that recipients provide preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States. These items include, but are not limited to, iron, aluminum, steel, cement, and other manufactured products.

Article 46, Made in America, applies to major facility construction stage awards and mid-scale research infrastructure implementation awards greater than \$20 million and notifies these awardees that they must retain appropriate documentation to substantiate any circumstance where the awardee has deemed a U.S. preference is not feasible in acquiring goods, products, or materials due to non-availability or unreasonable cost.

## **2. Assessment of the application of the domestic content procurement preference requirements**

### Domestic Procurement Preferences Not Applicable to NSF

NSF reviewed the authorities listed in section 70913(b)(2)(A)-(G) of the Act. The listed authorities are not applicable to financial assistance awards issued by NSF. There are no

NSF-specific statutes which require a domestic preference in NSF financial assistance programs.

#### Domestic Procurement Preferences Applicable to NSF

In reviewing other authorities, and as stated above, 2 CFR 200.322, Domestic Preference for Procurements, is included in the financial assistance awards issued by NSF subject to GC-1, or the CA-FATC.

### **3. Details on any applicable domestic content procurement preference requirement, including the purpose, scope, applicability, and any exceptions and waivers issued under the requirement**

As stated above, as of November 12, 2020, 2 CFR 200.322, Domestic Preferences for Procurements, from the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards applies to NSF financial assistance awards. NSF further reemphasized this new requirement by adding new terms and conditions to grants and cooperative agreements issued by NSF on or after October 4, 2021. Article 44 of the GC-1 and Article 45 of the CA-FATC are included in awards to ensure recipients are aware of the preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States. Further, the reference to 2 CFR 200.322 ensures the use of common definitions of “produced in the United States” and “manufactured products”.

The text of Article 44 of the GC-1 and Article 45 of the CA-FATC, Domestic Preferences for Procurements is:

The awardee is notified of the applicability of 2 CFR 200.322, entitled Domestic Preferences for Procurements.

Article 46 of the CA-FATC, which applies to major facility construction stage awards and mid-Scale research infrastructure implementation awards greater than \$20 million, adds

an additional requirement. See definitions in Section 4 below. This article requires the recipient to document and substantiate any circumstance where the recipient has deemed a U.S. preference not feasible in acquiring goods, products, or materials which could then be reviewed by NSF upon request.

The text of Article 46, Made in America is:

In implementation of 2 CFR 200.322, major facility construction stage awards and mid-Scale research infrastructure implementation awards greater than \$20 million must retain appropriate documentation to substantiate any circumstance where the awardee has deemed a U.S. preference not feasible in acquiring goods, products, or materials. The documentation must identify the basis for the determination and be based on:

- a. Domestic non-availability – articles, materials, or supplies are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities and of a satisfactory quality to meet technical or operational requirements;
- b. Unreasonable cost – the price of the domestic end product (including transport to the construction site) is higher than the price of a foreign end product by 30 percent if offered by small business or 20 percent if offered by other than a small business;
- c. The purchase is related to commercially-available information technology; and/or
- d. The purchases are at or below the micro-purchase threshold (currently \$10,000 for most acquisitions) or related to procurements for use outside of the United States.

The requirements of this article must be included in all subawards, contracts and purchase orders for work or products under this award.

NSF is not aware of any exercise of exceptions or waivers requested as to the domestic preference requirements established by 2 CFR 200.322 as implemented through GC-1 or the CA-FATC.

#### **4. A description of the type of infrastructure projects that receive funding under the program**

##### Types of Infrastructure Projects

As an integral part of its responsibility for strengthening the science and engineering capacity of the country, NSF provides support for the design, construction, operation, and upgrade of research infrastructure. NSF defines research infrastructure as any combination of facilities, equipment, instrumentation, computational hardware and software, and the necessary supporting human capital. Research infrastructure includes major research instrumentation, mid-scale projects, and major facilities.

NSF typically supports research infrastructure construction from two appropriations accounts: the Major Research Equipment and Facility Construction (MREFC) account and the Research and Related Activities (R&RA) account, but additional support may come from the Education and Human Resources (EHR) Account.

The MREFC account was created in 1995 to fund the acquisition, construction, commissioning, and upgrading of major science and engineering infrastructure projects that could not be otherwise supported by NSF directorate-level budgets without a severe negative impact on funded science. MREFC projects generally range in cost from one hundred million to several hundred million dollars expended over a multi-year period.

The R&RA account is used to support other activities involving a major facility that the MREFC account cannot support, including planning and development, design, operations and maintenance, and associated scientific research. Construction and

acquisition projects at a smaller scale, usually of a scale ranging from millions to tens of millions of dollars, are also normally supported from the R&RA account unless a specific program is included in the MREFC account.

Per Section 110 of the 2017 American Innovation and Competitiveness Act (AICA), as amended, a major multi-use research facility project (major facility) is defined as follows:

“(2) MAJOR MULTI-USER RESEARCH FACILITY PROJECT. The term ‘major multi-user research facility project’ means a science and engineering facility project that exceeds \$100,000,000 in total construction, acquisition, or upgrade costs to the Foundation.” (42 U.S.C. 1862s-2(g)(2)).

NSF interprets the above to mean the Total Project Costs (TPC) as defined by the investment in construction or acquisition, not the operations or associated science program costs. If the TPC for research infrastructure is above the major facility project threshold as defined by statute, it is considered a major facility throughout its full life cycle.

Per Section 109 of AICA, a mid-scale project means research instrumentation, equipment, and upgrades to major research facilities or other research infrastructure investments that exceeds the maximum funded by the Major Research Instrumentation (MRI) program (currently \$4M) and are below that of a major facility. Similar to major facilities, mid-scale projects may also involve development and design, construction or acquisition, operations, and eventual divestment.

For the purposes of implementing the Act and reporting the figures below, NSF defines “infrastructure” as any mid-scale project over \$20M and all major facilities, including upgrades to major facilities. At this time design, operations and routine maintenance costs associated with this infrastructure are not included.

**Programs, Number of Recipients, and Dollars Obligated for Fiscal Years 2019 through 2021**

Assistance Listing Number	Fiscal Year 2019		Fiscal Year 2020		Fiscal Year 2021	
	Number of Recipients	Funding	Number of Recipients	Funding	Number of Recipients	Funding
47.041 - Engineering	1	\$7,810,746	0	\$0	2	\$31,106,800
47.049 - Mathematical and Physical Sciences	3	\$83,541,638	3	79,349,626	5	\$89,530,899
47.050 - Geosciences	2	\$117,977,019	1	\$25,000,000	2	\$25,987,704
47.070 - Computer and Information Science and Engineering	0	\$0	0	\$0	0	\$0
47.074 - Biological Sciences	0	\$0	0	\$0	1	\$20,048,344
47.078 - Polar Programs	0	\$0	0	\$0	0	\$0
47.083 - Integrative Activities	0	\$0	0	\$0	0	\$0

**5. Identify and evaluate all infrastructure programs to determine if they are inconsistent with Section 70914 of the Act**

Currently NSF is fully compliant with all domestic preference requirements effective on the date of this report that are applicable to the Federal financial assistance awards issued by NSF.

Section 70914(a) of the Act requires the following:

“Not later than 180 days after the date of enactment of this Act, the head of each Federal agency shall ensure that none of the funds made available for a Federal financial assistance program for infrastructure, including each deficient program, may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.”



NSF will update its terms and conditions for affected programs to comply with this section of the Act on or before May 14, 2022.

Dated: January 14, 2022.

**Raymond McCollum,**

*Policy Branch Chief,*

*National Science Foundation.*

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